

## **MINUTES**

### **MONTANA SENATE 58th LEGISLATURE - REGULAR SESSION**

#### **COMMITTEE ON FINANCE AND CLAIMS**

**Call to Order:** By **CHAIRMAN TOM ZOOK**, on February 21, 2003 at 11:15 A.M., in Room 317-C Capitol.

#### **ROLL CALL**

**Members Present:**

Sen. Tom Zook, Chairman (R)  
Sen. Bill Tash, Vice Chairman (R)  
Sen. Keith Bales (R)  
Sen. Gregory D. Barkus (R)  
Sen. Edward Butcher (R)  
Sen. John Cobb (R)  
Sen. Mike Cooney (D)  
Sen. John Esp (R)  
Sen. Royal Johnson (R)  
Sen. Bob Keenan (R)  
Sen. Rick Laible (R)  
Sen. Bea McCarthy (D)  
Sen. Linda Nelson (D)  
Sen. Trudi Schmidt (D)  
Sen. Debbie Shea (D)  
Sen. Corey Stapleton (R)  
Sen. Emily Stonington (D)  
Sen. Jon Tester (D)  
Sen. Joseph (Joe) Tropila (D)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Prudence Gildroy, Committee Secretary  
Taryn Purdy, Legislative Branch

**Please Note.** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing & Date Posted: SB 305, 1/31/2003  
Executive Action:

HEARING ON SB 305

Sponsor:            **EMILY STONINGTON, SD 15, Bozeman**

Proponents:

Opponents:

Opening Statement by Sponsor:

**EMILY STONINGTON, SD 15, Bozeman** advised the bill came out of a concern that the **Department of Public Health** has been using emergency rule to reduce budgets, and has done it more than once in the current biennium. There is a question about the appropriateness of that as public policy. Emergency rule doesn't require public hearings or extensive public input and these are budget reductions that affect a lot of people and a lot of money. They are extremely difficult decisions to make and she agreed to bring the bill forward mainly for discussion. She served this session for the first time on the **Human Services Sub-Committee** and she saw budget decisions being forced on the department that are extremely difficult decisions, and the most fragile Montanans are being hurt. Those fragile Montanans and their providers aren't having input into how those budget reductions are being made. The emergency rule allows the department until the last minute to make the reductions. If they have to use administrative rule they're going to have to see them coming. She hoped this would be a good education as to how decisions get made, either by administrative rule, by emergency rule, or by contractual arrangement.

Proponents' Testimony:

**Keith Colbo, AWARE, Inc.**, thanked **SEN. STONINGTON** for bringing the bill forward. He advised he had been state budget director on two occasions and was a director of the **Department of SRS**. He reviewed the emergency rules that had been adopted in the last 18 months that affected budget reductions. Only those by **DPHHS** have been filed as emergency rules to adjust budgets and make amendments. He understood budgets must be balanced, and thought he had a hand in drafting that law many years ago. Emergency rules require a very high standard. Part of the existing law reads, "Because the exercise of emergency rulemaking power precludes the people's constitutional right to prior notice and participation of their government, it constitutes the exercise of extraordinary power requiring extraordinary safeguards against abuse. An emergency rule may be adopted only in circumstances that truly and clearly constitute an existing imminent peril to the public health, safety or welfare that cannot be averted or

remedied by any other administrative act." The first amendment is to the section that would exclude administrative budget adjustments from emergency rulemaking. An alternative is regular rulemaking, he held, and the notice and opportunity for participation by those affected by the process. It takes more time and that is part of the issue. Budget reductions must be made and **DPHHS** is unusual in that rates are set in rule. He contended that six times in a twelve month period sets an environment for clients and providers of not being able to offer input in areas they are going to be impacted by. The providers are the first line of contact with the clients and when they have no sense of when an emergency rule is going to be brought, its going to affect their rates and those they serve on a daily basis. It makes a very difficult relationship, both with the department and with the client. The second amendment would require an impact statement that the service provider impact be recognized. He contended an important aspect of regular rulemaking process is that the client and provider impact be recognized. As director of the **Department of SRS** for four difficult years, he did not adopt an emergency rule.

#### Opponents' Testimony:

**Russ Cater**, **DPHHS**, appeared on behalf of the department and the administration of **Governor Judy Martz** to oppose SB 305. He said they oppose the bill somewhat reluctantly. He said he would prefer not to work on emergency rules and the department does not enjoy doing emergency rules. By far, the largest number of rules the department promulgates are through the regular rulemaking process. It is only in those situations in which the department really believes there is some immediate public health, safety or welfare issue that causes the adoption of emergency rules. In the past twelve months, there have been several emergency rules adopted by the department, he admitted, and many of these rules are the result of budget shortfalls. All of the emergency rules have taken place as a result of changes the department saw were needed in the Medicaid program. The Medicaid program starts administrative rules immediately following the legislative session, and they will probably start the rules before the session is over. The subcommittee that establishes their appropriation gives them a good idea, early on during the session, as to how much money they are going to appropriate to the Medicaid program. They look at the amounts and try to figure the number of individuals that will be eligible for the Medicaid program, and look at the utilization of services and cost of services. They anticipate having the rule active on July 1. The process takes three to four months. They establish the rates according to legislative intent. A few months down the road, the department looks at the data for its Medicaid program and in fact

they look at it every week. It is usually about five months before the department can actually get a true picture of the outlook for the Medicaid program. In past years, they have been fortunate and haven't had to make adjustments. In the past 18 months there has been a dramatic increase in eligible people for the program and utilization and cost of services. As a result, by November they needed to do something quickly to make up the difference by the end of the fiscal year because state law requires agencies not exceed the appropriation they have in their budget. State law in 17-8-104 makes the director of the department personally liable if the budget exceeds what was appropriated. In a regular rule-making process it is about four months before the rule is effective. An emergency rule is effective on the date filed with the **Secretary of State's** office. The drawbacks are limited public testimony. If they want to make a cut and enact it January 1st, maybe there can be a cut of 7%. At a later date they would either have a 12% cut or have to cut services drastically. A 12% cut would make a lot of providers drop out of the Medicaid program. Whenever they're adopting emergency rules, the department has taken the position that for reimbursement rates they will make an effort to give providers an opportunity to respond. They make a publication in the newspaper and allow seven to ten days for a response, and some limited notices are mailed. Emergency rules are only good for 120 days, and in all instances they are actually going through the regular rulemaking process started within a few weeks after they file their emergency rules. They want to give people the opportunity to respond and are trying their best to do that with the limited resources they have. As a result of the revenue shortfalls, the Governor required all state agencies to enact 3.5% reductions. The reason for the number of emergency rules is looking at the budget and the general shortfall in the state budget.

**Questions from Committee Members and Responses:**

**SEN. TRUDI SCHMIDT** asked if emergency rules are good for 120 days only.

**Mr. Cater** indicated yes.

**SEN. SCHMIDT** asked about the process for working on the administrative rule.

**Mr. Cater** advised the process for either emergency or regular rules are somewhat similar. They have the same type of notice and they file with the **Secretary of State**. After an emergency rule is filed, there are opportunities for a hearing and written comments. During this time, the emergency rule is in effect

until the 120 days elapse or until they adopt the other rule through the regular rulemaking process.

**SEN. SCHMIDT** asked if it mainly applied to the Medicaid area.

**Mr. Cater** explained emergency rules, according to law, can happen in any program, but in the last 18 months they were in the Medicaid program.

**SEN. SCHMIDT** asked **Mr. Colbo** if he was not faced with Medicaid problems or if there was some other way to deal with it.

**Mr. Colbo** recalled an occasion when rates were determined to be inadequate by nursing home providers. There was a strike at that time and it ended up in special session. The same basic process was in effect during that time period.

**SEN. ROYAL JOHNSON** asked **SEN. STONINGTON** about her solution for those situations.

**SEN. STONINGTON** advised the bill would not allow emergency rules for budget reductions. The reason for the bill is a budget reduction has trouble being justified as existing imminent peril of public health safety or welfare. It would necessitate different judgements on the part of the department to do it other than through emergency rule--a longer time frame, adequate notice, and adequate hearing. That is the policy decision. The alternative is using administrative rule and taking a longer time frame.

**SEN. JOHNSON** said 120 days seems like a reasonably long time if there is an emergency. He asked if it was 30 days to notify of an emergency rule.

**CHAIRMAN ZOOK** advised it was immediate for an emergency rule.

**SEN. STONINGTON** stated the purpose of the emergency rule is to put something in place today and if it has to last for more than 120 days, then an administrative rule is initiated to make that change permanent.

**SEN. JOHNSON** said it is a judgement call on the part of the department and the bill says if that emergency is the result of a shortage of money, then the program cannot be reduced.

**SEN. STONINGTON** contended they would have to use trend forecasting and look further into the future. If Medicaid is the issue, they would have to look at trends, anticipate, and make that forecast, and start the administrative rule process further

in advance. She said she is just presenting it as an issue and has some ambivalence herself as to what is appropriate.

**SEN. JOHNSON** said it would take power the department needs to function away from them and he was not so sure they didn't need that power. **SEN. STONINGTON** agreed.

**SEN. KEITH BALES** asked about page 1 line 24, "The sufficiency of the reasons for a finding of imminent peril to the public health, safety, or welfare is subject to judicial review upon petition by any person."

**Mr. Colbo** believed there was a **Supreme Court** ruling on emergency rules under this statute and they held emergency rules meet that threshold. It has not been litigated recently.

**SEN. BALES** asked if the **Supreme Court** says for budgetary purposes, it does meet this criteria, and **Mr. Colbo** said that was his understanding.

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**SEN. RICK LAIBLE** noted through the process there is a moving target and if the bill passes it takes away some flexibility.

**Mr. Cater** advised on July 1 the department will try to take into account what the legislature thinks is an appropriate amount. They are told to freeze or increase the rates. It is a moving target and they could see a spike and file a regular rule and make a guess. There may be a broader picture later.

**SEN. LAIBLE** asked if the statute is a mechanism used to fill out peaks and valleys.

**Mr. Cater** said he was not sure if he could say yes to that. The department does not like to do emergency rules because it cuts people out of the process. The emergency rule is used because they wait until they have a bigger picture. In the past year there had been such dramatic increases, they were afraid if they didn't take the emergency rule process, at the end they would have to do something drastic such as a significant increase or reduction. That is where imminent health and peril come into play.

**Closing by Sponsor:**

**EMILY STONINGTON** closed on the bill. She had some ambivalence, but it is a dilemma that on the one hand the department is trying to manage money and there is a finite amount of money available to them. They are trying to do their best to provide the best

services they can under the limited funds. On the other side of the dilemma are providers and people receiving those services who are trying to have some stability in their lives. The department zaps their ability to run their lives and their business every few months. Instability shifts and that is why it is not an easy issue.

**EXECUTIVE ACTION ON SB 305**

**Motion:** SEN. LAIBLE moved TO RECONSIDER SB 30.

SEN. LAIBLE explained he was reminded by SEN. STAPLETON the committee is about finance. The bill was already passed on the floor. He opened the discussion on the bill previously and thought he was out of line in speaking to the bill before as opposed to the fiscal note.

SEN. ZOOK advised this is a money committee but many times they also deal with the content of The bill.

**Discussion:**

SEN. STONINGTON recalled asking that question. It is her impression when the bill comes here, they are concerned about the financial aspects, but are talking about the content of the bill. People need to vote their conscience, not just about the money but about the bill.

CHAIRMAN ZOOK noted it did pass the floor, but committees do that constantly.

SEN. GREG BARKUS rose against the motion. He indicated the only fiscal note is the sponsor's fiscal note. He called the district court judge in Kalispell regarding this issue, who felt the sponsor's assumption is low on the number of cases that would come before his bench, and the cost to the state of Montana would be an incredible hardship.

SEN. LAIBLE wanted to discuss the fiscal note and SEN. BARKUS was discussing the fiscal note, not the motion to reconsider.

SEN. ED BUTCHER advised the bill passed those arguments that came across the floor and came to the committee because of questions on the fiscal note. He disagreed with the opinion of the judge.

**Vote:** Motion carried 10-9 with BARKUS, COONEY, MCCARTHY, NELSON, SCHMIDT, SHEA, STONINGTON, TESTER, and TROPILA voting no.

**ADJOURNMENT**

Adjournment: 11:56 A.M.

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SEN. TOM ZOOK, Chairman

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PRUDENCE GILDROY, Secretary

TZ/PG

**EXHIBIT (fcs39aad)**